No. 83-1906

In The
Supreme Court of the United States
October Term, 1983

JACKIE N. BEACH and JULIE M. BEACH,
Husband and Wife,
Petitioners,

vs.

OWENS-CORNING FIBERGLAS CORP.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case was brought in the district court for the Northern District of Indiana. Jurisdiction was based upon diversity of citizenship. 28 U.S.C. §1332(a). The petitioner, Jackie N. Beach, a resident of Indiana, sued

respondent, Owens-Corning Fiberglas Corp.,* an Ohio corporation, for damages for injuries allegedly caused by respondent's negligence. The petitioner was employed by U.S. Piping, Inc., which had contracted with Owens-Corning to supply labor on a construction project being performed on the premises of an Owens-Corning chemical plant. The petitioner was injured by escaping steam as he was turning a valve on a newly installed deaerator unit.

In granting summary judgment in favor of respondent, the district court ruled that at the time of petitioner's injury he was an Owens-Corning employee under Indiana's borrowed servant doctrine, and concluded that the Indiana Industrial Disputes Board had exclusive jurisdiction over petitioner's claim as provided by the Indiana Workmen's Compensation Act, I.C. 22-3-2-6. In reaching its decision on the question of petitioner's employment status, the district court, applying tests recognized under Indiana law, determined that U.S. Piping and Owens-Corning may have

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* Respondent has no parent corporation. The only publicly held company owning 10% or more of the stock of respondent is Corning Glass Works, Corning, New York. Respondent is affiliated with: Bayer-Owens Corning Glasswool (Belgium); Fiber Glass Canada, Inc.; Fiber-Glass Columbia, South America; Scandanavian Glass-Fiber, AB (Sweden); Zitro-Fibres, S.A. (Mexico); Zeroc-Technology, A/S (Norway); Polyplaster, S.A. (Brazil); Anianitit Fiberglas Industries, Ltd. (Saudi Arabia); Asahi Fiber-Glass Co., Ltd. (Japan); and Polyarm SA (Rio de Janiero, Brazil). Respondent has the following subsidiaries: Owens-Corning Fiber Glass Europe S.A. (Belgium); Owens-Corning Fiber Glass Deutschland GMBH (Germany); Owens-Corning Fiber Glass UK, Ltd. (England); Owens-Corning Fiber Glass France, FA; Owens-Corning Fiber Glass Italy, S.r.l.; Owens-Corning Fiber Glass Espana, SA; Owens-Corning Fiber Glass Netherlands, BV; O.C.Fibers, Brazil, LTDE; Owens-Corning Saudi Co., Saudi Arabia; Arabian Fiberglass Insulation Co., Saudi Arabia; Norsk Glass Fiber, A/S (Norway); American Borate Co., Las Vegas, Nevada; and OCFinance, BV (Netherlands).

been dual employers of petitioner and that Owens-Corning clearly possessed and was exercising the right to control the means, manner and method of the petitioner's work, at the time of his injury. Under its analysis of the relevant *indicia* of an employer-employee relationship, the court concluded that the material facts were not in dispute and that respondent was entitled to judgment as a matter of law.

The petitioner appealed from the district court's entry of summary judgment. In his argument before the Court of Appeals, petitioner asserted that there were genuine issues of materal fact which precluded summary judgment on the question of his employment status, and further that the district court had improperly denied his right to a jury trial by resolving the employment status issue on summary judgment. The Court of Appeals, in its initial decision filed on January 16, 1984, held that the district court's ruling on the issue of petitioner's employment status related only to the threshold jurisdictional issue of whether the case was exclusively within the province of the Indiana Industrial Disputes Board. Because, as the Court of Appeals noted, the determination of subject matter jurisdiction is a matter for the the court and not the jury, it concluded that the district court could properly resolve the issue of employment status on summary judgment. The Court of Appeals further held that material facts were not in dispute on the question of petitioner's employment status and that the district court had correctly applied Indiana law in reaching its decision.

The petitioner subsequently filed a petition for rehearing and suggestion for rehearing *en banc*. The Court of Appeals thereafter issued a revised opinion on February 24, 1984, and denied the petition for rehearing.

In its revised opinion, the court made it clear at the outset that the district court was correct in concluding that the material facts were not in dispute, and that at the time of his injury petitioner was an employee of Owens-Corning, as a matter of law. The Court revised its earlier decision by indicating that although the parties' arguments and the district court's ruling focused upon whether that court had subject matter jurisdiction, the petitioner, nevertheless, properly invoked the district court's diversity jurisdiction. However, the Court of Appeals affirmed the district court's entry of summary judgment based upon the fact that Indiana had eliminated the cause of action asserted by petitioner.

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REASONS FOR DENYING THE WRIT

A. This case presents no constitutional issue regarding the right to a trial by jury.

Petitioner's entire argument on appeal has been based upon the incorrect assumption that the district court resolved disputed issues of fact in reaching its conclusion that he was an Owens-Corning employee at the time of his injury. It is only from this erroneous premise that petitioner is able to draw into consideration this Court's decisions in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), and *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 79 S.Ct. 1184, 3 L.Ed.2d 1224 (1959).

The district court in this case, based upon the Indiana Court of Appeals' decision in *Downham v. Wagner*, 408

N.E.2d 606 (Ind.App. 1980), initially believed that the issue of whether a person engaged for services is an employee of a defendant, was determinative of the federal court's subject matter jurisdiction. *Beach v. Owens-Corning Fiberglas Corp.*, 542 F.Supp. 1328, at page 1329 (N.D. Ind. 1982). Yet, notwithstanding its belief in this regard, which the Court of Appeals later noted was incorrect, the district court did not then proceed to resolve disputed issues of fact. Rather, it applied the undisputed facts in its analysis of Indiana substantive law, and determined as a matter of law that, indeed, the petitioner was an employee, or borrowed servant, of Owens-Corning at the time in question. The Court of Appeals affirmed the district court's decision based upon its conclusion that, inspite of the district court's mis-application of *Downham v. Wagner, supra,* the district court was ultimately correct in entering summary judgment where "the material facts were not in dispute." *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407, at page 408 (7th Cir. 1984). It is this singular determination by the Court of Appeals which completely refutes the petitioner's present argument and renders the issuance of a writ inappropriate.

In considering the question of petitioner's employment status, the district court was required to apply Indiana substantive law. *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938). The Court, accordingly, referred to *Fox v. Contract Beverage Packers, Inc.*, 398 N.E.2d 709 (Ind.App. 1980), *Wabash Smelting, Inc. v. Murphy,* 134 Ind.App. 198, 186 N.E.2d 586 (1962), and *Jackson Trucking Co. v. Interstate Motor Freight System,* 122 Ind.App. 546, 104 N.E.2d 575 (1953), in order to ascer-

tain whether, based upon the undisputed facts presented, an employer-employee relationship existed between the parties. In the case of *Fox v. Contract Beverage Packers, Inc., supra,* the court recognized that a worker may be an employee of more than one employer at any given time, and discussed seven factors, or *indicia,* which Indiana courts have applied in resolving the question of employment status. Such factors include:

> "(1) the right to discharge; (2) the mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; (7) establishment of the work boundaries." *Fox, supra,* 398 N.E.2d 709, at pages 711-712.

In *Wabash Smelting, Inc. v. Murphy, supra,* the court had also articulated a general "control" test, stating that "the real and decisive test of employment . . . is who had the power or right to command the act and to direct the means, manner or method of performance. . . ." 186 N.E.2d 586, at page 592.

The district court's analysis incorporated both the *Fox* factors and the "control" test from *Wabash Smelting.* Against this background of Indiana law, the district court concluded, and the Court of Appeals agreed, that "[b]ecause the defendant clearly had the right to contral Beach's work, Owens-Corning was Beach's employer at the time of the accident as a matter of law. Under no circumstances could Beach be considered not to have been an Owens-Corning employee." *Beach v. Owens-Corning Fiberglas Corp., supra,* 728 F.2d 407, at page 409.

As this Court stated in *Propper v. Clark,* 337 U.S. 472, 486-487, 69 S.Ct. 1333, 1342, 93 L.Ed. 480 (1949):

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *See, Bishop v. Wood,* 426 U.S. 341, 347, 96 S.Ct. 2074, 2078, 48 L.Ed.2d 684 (1976).

The petitioner's contention that material questions of fact existed on the issue of his employment status is derived principally from his incorrect analysis of *Fox v. Contract Beverage Packers, Inc., supra.* Thus, the petitioner has sought to maintain that each of the seven *Fox* factors represents a "material fact", and that because less than all seven factors were found to exist in this case, the petitioner concludes that the district court must have improperly resolved a factual dispute in entering summary judgment. This argument, however, was specifically rejected by the Court of Appeals which stated: "We believe that nothing in *Fox* mandates a defendant to meet all seven factors before it can be considered an employer." *Beach v. Owens-Corning Fiberglas Corp., supra,* 728 F.2d 407, at page 409. Indeed, the Indiana Court of Appeals in *Fox* had affirmed the entry of summary judgment in a case in which less than all seven factors had been shown.

As indicated previously, it should be noted that the district court's incorrect belief that it was confronted with an issue of jurisdictional consequence did not, because of the undisputed nature of the facts presented, lead it into the province of the jury. As the Court of Appeals stated at page 409 of 728 F.2d:

> "[T]he plaintiffs properly invoked the district court's diversity jurisdiction. Even though Indiana law vests exclusive jurisdiction over cases such as this one in its Industrial Disputes Board, a federal court properly may exercise jurisdiction over them. State law cannot be construed to enlarge or contract federal jurisdiction."

Although the Court of Appeals found that the district court did have jurisdiction with respect to the petitioners' claim, it nevertheless affirmed the entry of summary judgment because Indiana had, through its Workmen's Compensation Act and interpretive case law, eliminated the cause of action asserted by the petitioners. Because the courts of Indiana would have no jurisdiction over the petitioners' claims, the Court of Appeals reasoned that the petitioners, in effect, had no claim to press in their federal action, which depended entirely upon state law. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538, 69 S.Ct. 1235, 1237, 93 L.Ed. 1524 (1949). See: *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315-16 (9th Cir. 1982); *Feinstein v. Massachusetts Gen. Hosp.*, 643 F.2d 880, 888 (1st Cir. 1981). Implicit in the Court of Appeals' affirmance of the district court, is its conclusion that the district court had reached the correct decision, based upon the undisputed facts, even if the district court's incorrect assumption with respect to its jurisdiction were removed from consideration. The petitioners' argument that the district court, relying upon *Downham v. Wagner, supra,* undertook to resolve issues of fact is without merit in light of the Court of Appeals' analysis.

There being no genuine issue as to any material fact, and respondent being entitled to judgment in its favor as a matter of law, the district court was clearly correct in

entering summary judgment in this case. While the posture of the petitioners' present argument would almost make it appear as though they are challenging the summary judgment procedure, in general, as an infringement upon their Seventh Amendment right to trial by jury, this Court made it clear even before the promulgation of the Federal Rules, that "[n]o one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined." *Ex parte Peterson,* 253 U.S. 300, 310, 40 S.Ct. 543, 546, 64 L.Ed. 919, 924 (1920).

B. The decision of the Court of Appeals does not conflict with decisions of other circuits, nor does it represent a departure from previous decisions of this Court.

Having incorrectly assumed the existence of a factual dispute, the petitioner is only then able to place reliance upon this court's decisions in *Byrd v. Blue Ridge Rural Electric Cooperative, supra,* and *Magenau v. Aetna Freight Lines, Inc., supra.* At issue in *Byrd* was whether a federal district court sitting in diversity was required to apply a South Carolina rule which required the judge, rather than the jury, to decide *factual issues* relating to an employer's immunity under that state's Workmen's Compensation Act. Similarly, in *Magenau,* this Court was concerned with the question of whether a district court in a diversity case was bound to apply a Pennsylvania rule which likewise required the judge to resolve *factual disputes* relative to employment status. In both decisions, this Court found that the state rules in compensation cases, permitting courts to decide factual issues without the aid of juries, were not "announced as an integral part of the special relationship created by the statute." *Byrd,*

supra, 356 U.S. at page 536, 78 S.Ct. at page 900. Accordingly, this Court concluded that "the federal court should not follow the state rule." Id., 356 U.S. at page 538, 78 S.Ct. at page 901. The circumstances presented in *Byrd* and *Magenau* are thus clearly different from those in the case at bar, in which "the material facts are not in dispute." *Beach v. Owens-Corning Fiberglas Corp.,* 728 F.2d 407, at page 408. The Court of Appeals correctly pointed out that its "ruling does not raise the issues concerning the right of trial by jury considered in [*Byrd* and *Magenau*]." Id., 728 F.2d 407 at page 409. This case does not, therefore, present the proper context for any re-examination of *Byrd* and *Magenau,* and respondent submits that this Court should decline the petitioners' invitation to do so.

The petitioners' assertion that the decision of the Seventh Circuit in the present case is in conflict with other circuits which have applied *Byrd* again assumes that *Byrd* is applicable, which it is not. It further appears that if there is any conflict among the circuits which have applied *Byrd* (and no such conflict is shown on the basis of the cases cited by petitioners), it has nothing to do with the point in issue in this case. What is, in fact, made clear by petitioners' argument is the apparent widespread reliance upon *Byrd* for a variety of principles which possess continued force and validity. That different cases cite different principles, each of which is valid, presents no conflict, and does not render the issuance of a writ of certiorari appropriate.

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CONCLUSION

The United States Court of Appeals for the Seventh Circuit has found that the district court in this case was correct in entering summary judgment in favor of respondent, Owens-Corning Fiberglas Corp., based upon undisputed material facts and its interpretation of Indiana substantive law. Accordingly, this case presents no constitutional issue concerning petitioners' right to trial by jury, and the Court of Appeals' decision is not in conflict with previous precedents of this Court, or decisions of the other circuits. The Petiton for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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